United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

74-2168 B
P/S

TO BE ARGUED BY
HARVEY D. CARTER, JR.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 74-2168

THE VERMONT NATURAL RESOURCES COUNCIL, INC.; CATHERINE BEATTIE, Individually and as a member of the VERMONT NATURAL RESOURCES COUNCIL, INC.; CITIZENS ASKING FOR RECONSIDERATION OF ROUTE 2; and LESLIE A. PARKER, Individually and as a member of CITIZENS ASKING FOR RECONSIDERATION OF ROUTE 2,

Plaintiffs-Appellants,

v.

CLAUDE S. BRINEGAR, Secetary of Transportation, DAVID B. KELLEY, Division Engineer, Federal Highway Administration; H. JAMES WALLACE, FRANK S. BALCH, HENRY O. ANGELL, ROBERT S. BIGELOW and WILLIAM COSTA, in their capacities as members of THE VERMONT STATE HIGHWAY BOARD; and JOHN T. GRAY, Commissioner of Highways, State of Vermont,

Defendants-Appellees,

TOWN OF ST. JOHNSBURY,

Defendant-Intervenor.

On Appeal From the United States District Court
For The District Of Vermont

BRIEF OF APPELLANTS

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Preliminary Statement

This brief is submitted on an appeal from the Order entered on August 16, 1974 and Findings of Fact, Conclusions of Law and Opinion filed August 21, 1974 in the United States District Court

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for the District of Vermont by the Honorable Albert W. Coffrin, United States District Judge. The Findings of Fact, Conclusions of Law and Opinion are not to date reported.

STATEMENT OF ISSUES

I. Whether the Federal Highway Administration has complied with the requirements of the National Environmental Policy Act of 1969, 42 U.S.C. 4321 et. seq.

   A. Whether an environmental impact statement prepared under Federal Highway Administration's Policy and Procedure Memorandum 90-1 by State Highway Department officials seeking Federal-aid funds is a statement prepared by the "responsible official" under Section 102(2)(C) of the National Environmental Policy Act of 1969, 42 U.S.C. 4332(2)(C).

   B. Whether the Federal Highway Administration has complied "to the fullest extent possible" with Section 102(2)(C) of the National Environmental Polic Act, 42 U.S.C. 4332(2)(C).

II. Whether defendants' activities on the Sleepers River are in violation of the Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. Sections 1301, 1444.

   A. Whether the facts constitute a bar to the District Court's consideration of plaintiffs' claims under the Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. Sections 1251, et. seq.

   B. Whether defendants' activities in the Sleepers River are of a kind and in a location which Congress intended to regulate through the Federal Water Pollution Control Amendments of 1972, 33 U.S.C. 1251, et. seq.

III. Whether the responsible official's failure to consider any alternatives to the proposed Sleepers River interchange, as required by Section 102(2)(C)(iii) of the National Environmental Policy Act of 1969, 42 U.S.C. 4332(2)(C)(iii) warrants reversal of the District Court's denial of injunction against defendants' activities pending their compliance with

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the National Environmental Policy Act of 1969 and the Federal Water Pollution Control Act Amendments of 1972.

A. Whether the scope of appellate review of an Order granting or denying an injunction is broad when it appears that the District Court's consideration of the merits of plaintiffs' claim, its balancing of the equities, and its consideration of the public interest, was based on a misconception of the applicable law.

B. Whether injunctive relief is the appropriate result when laches is not an issue, plaintiffs have shown imminent irreparable harm and the District Court has found a substantive violation of the National Environmental Policy Act of 1969.

C. Whether consideration of the appropriate relief for violation of the National Environmental Policy Act involves a traditional balancing of the equities.

PRELIMINARY STATEMENT OF THE CASE*

In July of 1973, defendant Federal Highway Administration ("FHWA") announced the availability of a draft Environmental Impact Statement ("EIS") prepared pursuant to Department of Transportation Policy and Procedure Memorandum (PPM) 90-1, by the Vermont Highway Department ("VHD"). The Statement covered the proposed construction of the remaining sections of Interstate 91 ("I-91"), Interstate-93 ("I-93") from the Connecticut River to an interchange with I-91 near St. Johnsbury, Vermont, and a 4.3

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*Because of the time limitations involved, plaintiffs have requested leave pursuant to Rule 30(f) to dispense with the requirement of a printed appendix. Additionally, since no transcript is available at this date, plaintiffs have also requested leave to file, on or before September 16, 1974, a statement of the case with appropriate references to the record.

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mile relocation of U.S. Route 2("U.S. 2") from an interchange with I-91 at St. Johnsbury, westerly to Danville, Vermont.

Plaintiff Vermont Natural Resources Council ("VNRC") sent in written comments on the draft EIS within the comment period provided for in PPM 90-1. VNRC noted the District Court decision in Conservation Society v. Secretary, and informed VHD that EIS's must be prepared by the "responsible federal official" in order to comply to the fullest extent possible with the National Environmental Policy Act of 1969 ("NEPA"), 42 U.S.C. §4321, et seq. VNRC also stated that the draft EIS indicated insufficient consideration of alternatives; it indicated only one location for relocated U.S. 2 and failed to discuss the alternatives of reconstruction on existing location at less than 65 m.p.h. design speed and on less than a 4-lane right-of-way (EIS p. 233). Noting that U.S. 2 between St. Johnsbury and Montpelier, Vermont is designated in Vermont's 1990 National Highway Needs study as a "Principal Arterial", that construction of I-93 in New Hampshire was planned between Littleton, New Hampshire, and the Connecticut River, VNRC stated that the draft EIS insufficiently considered the cumulative impacts of future projects, and failed to consider the coercive effects of construction upon successive highway segments in this east-west transportation corridor. VNRC drew particular attention to the relationship between I-93 from Littleton, New Hampshire to I-91, and the remaining unbuilt portion around Franconia Notch, New Hampshire. VNRC also

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suggested that an EIS discussing the economic benefits of a proposed project should also consider the project's direct and indirect costs.

VNRC's comments regarding cumulative effects and future projects were echoed in the comments of the U.S. Department of Interior and the U.S. Environmental Protection Agency. U.S. Department of Interior also noted that the draft EIS's discussion and maps of the relocation of Roy Brook and Sleepers River (part of the interchange and relocation of U.S. 2) made environmental analysis of the effects of that relocation impossible (EIS p. 211).

On April 22, 1974, the Council on Environmental Quality published in the Federal Register the availability of the Final EIS. On May 22, it became a final document. The final document covered only I-91 and U.S. 2.

The final EIS was prepared by VHD pursuant to PPM 90-1. (Op. 7). FHWA did not write any part of the EIS nor did it conduct any independent studies or analysis of the project. (Op. p. 8). Nonetheless, FHWA's comments upon and review and adoption of the EIS constituted significant input to the EIS. (Op. p. 11).

The final EIS responded to the comments of VNRC and Interior Department relating to full consideration of alternatives by stating that the projects considered in the EIS were "exempt from NEPA" by virtue of their "design approval" prior to February 1, 1970 (EIS p. 216).

The EIS found that "the only potential for adverse effects

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lies in the construction period" (EIS p. 6) notwithstanding that VHD proposed to construct a major highway facility which will result, among other things, in the channelization of 4800 feet of the Sleepers River.* Such construction will have an "obvious ecological impact...upon the River itself and its vicinity." (Op. p. 21). Although the EIS, as it applies to the Sleepers River interchange, in general reflects good faith consideration of environmental factors (Op. p. 16), no alternatives to the interchange as required by NEPA are set forth in the EIS (Op. p. 19). The EIS's failure "to consider the elimination of the interchange as an alternative to eliminating or severely reducing the ecological impact upon the Sleepers River [renders it] deficient in this regard." (Op. p. 21).

On or about June 9, 1974, defendant VHD advertised for bids on "Contract 2", which included a portion of I-91, the U.S. 2 interchange, and 0.25 miles of U.S. 2 beyond the interchange [projects I 91-3(6), F 028-4(4) and F 128-4(3)]. On June 15, plaintiffs retained counsel, and on June 17, the plaintiffs, individual residing in Caledonia County, Vermont, and two conservation organizations, sued FHWA and VHD in the United States District Court for the District of Vermont. In their

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*That portion of the Sleepers River to be channelized and the vicinity of channelization are generally depicted in the series of photographs comprising Plaintiffs' Exhibit (PX) 28.

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complaint for declaratory and injunctive relief the plaintiffs requested the District Court to halt construction of the above-mentioned projects, plus two other projects contained in the EIS [F 028-4(2), and F 028-3(5)] comprising a U.S. 2 relocation from the interchange to Dole Hill, in Danville, Vermont. Plaintiffs claimed that the defendants had not complied with NEPA, the Federal Water Pollution Control Act Amendments of 1972 (FWPCA), 33 U.S.C. §1311, 1344, and the Rivers and Harbors Act of 1899 33 U.S.C. §407.

On the same day, the plaintiffs moved for a Temporary Restraining Order, pursuant to F.R.C.P. 65(b), to restrain defendants from awarding "Contract 2". After a brief hearing on the motion on June 19 and 20, the District Court, Honorable Albert W. Coffrin, denied plaintiffs' motion. Defendants then awarded "Contract 2" to a private construction corporation.

Plaintiffs moved pursuant to FRCP 65 to consolidate the preliminary injunction hearing with the full hearing on the merits, and the District Court took evidence on July 2, 3, 5, 8 and 9.

At trial, Plaintiffs' witness transportation planner Robert L. Morris testified that the proposed relocation of U.S. 2 would coerce the construction of successive segments of U.S. 2 westerly to a junction with I-89 at Barre-Montpelier, Vermont, and east from I-91 through St. Johnsbury. He testified that I-91 could be built without the U.S. 2 interchange, that the interchange would

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increase traffic congestion within St. Johnsbury, and that the other I-91 interchanges around St. Johnsbury could adequately deal with the traffic through, in and around St. Johnsbury. He found the design capacity of the U.S. 2 interchange and relocation far in excess of the traffic volumes projected by VHD and he stated that projected traffic could be handled on a reconstructed 2-lane U.S. 2 on its present location without a 4-lane right-of-way. Mr. Morris testified as to the feasibility of relocating U.S. 2 from its current proposed intersection with I-91, along the I-91 right-of-way to the "southern" interchange with I-91. He found the spacing of the 3 St. Johnsbury interchanges considerably less than the 5 to 8 miles spacing generally recommended by the American Association of State Highway and Transportation Officials (AASHTO) (1.8 miles between the "southern interchange" and the U.S. 2 interchange, 2.5 miles between the U.S. 2 interchange and the "northern interchange").

Defendants' witnesses, VHD Chief Engineer Edward Stickney, VHD Advance Planning Engineer Arthur Goss and Traffic Engineer Joseph Landry agreed that I-91 could be constructed without the U.S. 2 interchange. FHWA Division Engineer David Kelley agreed that U.S. was a "borderline judgment" for construction on a 4-lane right-of-way and that 2-lane construction was a viable alternative. Mr. Stickney agreed that Mr. Morris' "southern interchange" proposal was feasible. Plaintiffs introduced into evidence the "St. Johnsbury Urban Area Transportation Plan" (PX 17, prepared by VHD in 1971) which describes the design of the

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relocated U.S. 2 as more than adequate to meet expected traffic (at p. 5[illegible]).

Plaintiffs also introduced into evidence the maps for the "1990 Needs Study", showing U.S. 2 from St. Johnsbury to Montpelier, as a "Principal Arterial"; Vermont's Priority Primary Routes Study (PX 5), listing U.S. 2 construction between St. Johnsbury and Montpelier as the 4th priority in the state (and see 23 U.S.C. §126 "Priority Primary Funding"); and Vermont's 1974 National Transportation Plan (PX 7), which states at p. 2-80, that aside from the reconstruction of Route 7 from the Massachusetts state line to Burlington, and the Burlington Beltline, "...the only additional new highway construction between 1972 and 1990 consists of the improvement of Route 2 between Barre-Montpelier and St. Johnsbury." Defendant Kelley testified that the construction of the Sleepers River interchange was an integral part of U.S. 2.

Plaintiffs called Frederick Mold, Director of the Fairbanks Museum in St. Johnsbury and an expert ecologist, to testify about the environmental significance of the Sleepers River valley. Mr. Mold stated that the river and its valley were an irreplaceable educational and recreational resource for the citizens of St. Johnsbury, particularly for the children of low-income families (Op. p. 23). He testified that thousands of young people had used the valley during the past 22 years. The proposed construction will, in his opinion, utterly destroy the valleys and river's educational and recreational values, except as an example of

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"what a mess man can make."

Martin Johnson, Secretary of Vermont's Agency of Environmental Conservation, testified that Roy Brook and Sleepers River are pristine streams capable of sustaining a naturally reproducing trout population, and that at his request VHD had a meeting with representatives of the Vermont Department of Fish and Game and the U.S. Fish and Wildlife Service, during the comment period following publication of the draft EIS, to discuss alternatives to the relocation of those rivers in conjunction with the construction of I-91 and U.S. 2. Angelo Incerpi of the Vermont Department of Fish and Game testified that at that meeting, VHD officials informed him that it was too late to alter the design or location of any part of I-91 or U.S. 2 and that any comments of the Vermont or U.S. Agency should be directed toward mitigation of whatever damage would occur, by design modifications of the culverts to be constructed in the two streams.

Mr. Incerpi produced a 1974 population study he had conducted in the Sleepers River in the area of proposed construction, indicating significant trout populations. He testified that the river's temperature is already marginal for trout and that the river location would have a critical effect on its capacity to support a trout population, both in the area of construction, and as far downstream as the Passumpsic River (U.S. Corps of Engineers comment in the EIS states that the Passumpsic River is "navigable water" within the meaning of the 1899 Rivers and Harbors Act, 33 U.S. §401, et seq.).

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Defendant Kelley testified that VHD was seeking permits under FWPCA §404 (33 U.S.C. §1344) for its construction activities on the Passumpsic River, but that neither VHD nor FHWA had thought it necessary to seek permits for their activities on Sleepers River.

Defendants introduced memoranda from the Vermont Department of Fish and Game indicating that the Sleepers River had little value as a trout stream. Mr. Incerpi testified that those memoranda were written in 1963 and 1967, based on a 1955 species distribution (as opposed to "population") study conducted by Mr. MacMartin of that agency. Mr. MacMartin testified that his 1955 testing methods had not been designed to discover the size of the trout population, and that Mr. Incerpi's 1974 testing methods were proper in assessing the current population.

Mr. Aldrich, the VHD official who prepared the draft and final EIS, testified that the Department's environmental analysis consisted essentially in a file search to incorporate into the EIS the correspondence VHD had had in the past with other state agencies. He stated that VHD does not employ a biologist nor any expert in the natural sciences and that no such expert played a part in the preparation of the EIS. Mr. Aldrich and Mr. Goss testified that the preparation of the EIS was financed 90% by FHWA funds (in the same proportion as the federal share for I-91 construction).

Mr. Kelly of FHWA testified that the Division Office was in daily contact with VHD members who prepared the draft and final

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EIS, although discussions did not always concern the preparation of the EIS herein at issue. (Op. p. 7) He testified that the individual who maintained that contact was Gordon Hoxsie, a Highway Engineer, that the Division office employs no biologist or expert in the natural sciences, and that no portion of the draft or final EIS was written by his office.

Mr. Altobelli, who headed the FHWA Regional Office multi-disciplinary review team, testified that no member of the team was a biologist or an expert in the natural sciences, and that no member of the team visited the sight of the proposed construction. He testified that he did not know whether PPM 90-1 or the C.E.Q. Guidelines for Preparation of Environmental Impact Statements, 43 CFR 1500, et. seq. were in effect at the time of his review of the draft and final EIS.

Defendants submitted into evidence handwritten comments by FHWA Regional and Division office reviewers. (DXS A and B). Neither Mr. Altobelli nor Mr. Kelley were able to state that any of those comments had been followed in the preparaton of the final EIS. At least one of the regional reviewers found the data and maps of the draft EIS insufficient for any meaningful envionmental review and criticized the draft for failure to "adequately discuss alternatives and their environmental impacts..." (DX A).

The defendants introduced into evidence documents indicating that in response to Corps of Engineers comments on the draft and final EIS, flood studies were commenced on the Passumpsic River Valley after DOT and FHWA approved and adopted the final EIS on

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February 22, 1974. Defendants introduced further evidence indicating that studies of All-Right Spring (an important landmark to be eliminated by the construction of the remaining portions of U.S. 2 covered in the EIS) are still on-going, and that the full effects of construction of U.S. 2 upon the spring are not yet known.

Arthur Goss testified that the Vermont legislature approves a seven year highway construction program which directs construction of highway projects in Vermont, and that U.S. 2 is included therein.

During and after the hearing on the merits, defendants commenced and/or supervised the construction activities on "Contract 2" in the vicinity of the Sleepers River. On August 2, plaintiffs again moved for a temporary restraining order pending the Court's decision on the merits. In chambers, the Court stated that although there was no question that plaintiffs would suffer irreparable harm if construction went forward, it had finally concluded that the plaintiffs had no probability of success on the merits. The Court stated that Greene County v. FPC was distinguishable, and that notwithstanding deficiencies in the methodology and conclusions of the EIS, it was convinced that if the EIS were commenced again by FHWA, VHD and FHWA would still find the U.S. 2 interchange with I-91 necessary.

However, when plaintiffs reasserted defendants' violations of FWPCA, and pointed out that Act's expanded definition of

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"navigable waters" as "waters of the United States", Judge Coffrin granted plaintiffs' motion pending his decision. The District Court ultimately ruled, however, that plaintiffs cannot maintain their action under the FWPCA amendments (Op. pps. 31-32).

On August 16, the Court issued its judgment order, denying plaintiffs preliminary and permanent injunctive relief regarding the projects under construction within "Contract 2." On August 19, 1974 plaintiffs filed their notice of appeal, and moved the District Court for an injunction pending appeal pursuant to Fed. R. Civ. P. 62(c). Plaintiffs' motion was denied.

On August 19, plaintiffs moved this Court pursuant to Rule 8 Fed. R. App. P. for a stay pending appeal. This motion was heard on August 20 by Honorable James L. Oakes, applications judge for the week of August 19. On August 21, Judge Oakes granted plaintiffs' motion until midnight August 26. On August 26, a three judge panel, Honorable Paul R. Hays, Honorable Walter R. Marsfield and Honorable Murray I. Gurfein, heard plaintiffs' motion and by Order dated August 26 granted a stay pending appeal.

ARGUMENT

POINT I

THE FEDERAL HIGHWAY ADMINISTRATION HAS NOT COMPLIED WITH THE REQUIREMENTS OF THE NATIONAL ENVIRONMENTAL POLICY ACT OF 1969, 42 U.S.C. 4321 et. seq.

In Greene County Planning Board v. Federal Power Commission, 455 F. 2d 412 (2d Cir. 1972) cert. denied, 409 U.S. 849 (1972), this Court held that the explicit statutory command of NEPA, and

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the strong policy considerations underlying it, require the federal agency to prepare an EIS on major federal actions significantly affecting the quality of the human environment. In Greene County the Federal Power Commission "abdicated a significant part of its responsibility by substituting [an applicant's] statement...for its own." 455 F. 2d at 420. "It is," this Court said,

> NEPA's mandate to consider environmental values at every distinctive and comprehensive stage of the [agency] process. The primary and non-delegable responsibility for fulfilling that function lies with the Commission." Id. citing Calvert Cliffs Coordinating Committee v. AEC, 449 F. 2d 1109, 1119 (D.C. Cir. 1971).
>
> NEPA at section 102(2)(C) "...explicity requires the agency's own detailed statement' to accompany the proposal through the existing agency review process'." 455 F. 2d at 421 (emphasis in original).

Among the bases for this conclusion were:

> "[1]...intervenors generally have limited resources ...and thus may not be able to provide an effective analysis of environmental factors... [2] the danger of [FPC's] procedure, and its obvious shortcoming, is the potential, if not the likelihood, that the applicant's statement will be based on self-serving assumptions...[3] Congress has compelled agencies to...formulate their own position early in the review process... [and 4]...alternatives might be lost as the applicant's statement tended to produce a status quo syndrome." Id. at 420.

Four district court cases in this circuit have concluded that the holding in Greene County controls in Federal-aid highway cases.* In Committee To Stop Route 7 v. Volpe, 346 F. Supp. 731

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* See also Northside Tenants' Rights Coalition v. Volpe, 346 F. Supp. 244, 248 (E.D. Wisc. 1972); Iowa Citizens for Environmental Quality v. Volpe, 487 F. 2d 849, 955 (8th Cir. 1973) (Lay, J. dissenting).

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(D. Conn. 1972) Judge Newman held that "[in] this case, federal officials must prepare the final version of the impact statement as required by the plain wording of NEPA." As reasons for his conclusion, Judge Newman said that "[t]his was held to be a requirement of the statute...[and]...the very same danger of self-serving assumptions that concerned the Court in Greene County is present here." 346 F. Supp. at _____ , 4 ERC at 1335.

In Conservation Society v. Secretary (II), 362 F. Supp. 627 (D. Vt. 1973) appeal filed, No. 73-2629 (2d Cir. 1973)* Judge Oakes imposed the same requirements for the following reason:

> ...it is impossible for the Vermont Highway Department not to be an advocate of legislatively mandated construction and still act consistently with its duty as a state agency. This being true, delegation of the preparation of the EIS to the VHD raises the danger that the EIS will reflect "self serving assumptions" and brings the case directly within Greene County. 362 F. Supp. at 631.

In I-291 Why? Association v. Burns, 372 F. Supp. 223 (D. Conn. 1974) appeal filed, No. 74-1545 (2d Cir. 1974) Chief Judge Blumenfeld went even further than Conservation Society II or Committee To Stop Route 7, supra. Noting that the Connecticut Department of Transportation lacks the Vermont Highway Department's legislative directive to build the projects covered in the EIS therein at issue, he stated:

> But this does not mean that CONNDOT is necessarily disinterested in whether FHWA agrees to fund I-291 ...CONNDOT is just as likely to lard an EIS with self-serving assumptions as were the state highway department in Southern Vermont and the State power

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*To be argued on the same day as this case, September 18, 1974.

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authority in Greene County. 372 F. Supp. _____, 6 ERC 1275, 1290.

In Steubing v. Brinegar, ___ F. Supp. _____, 6 ERC 1935 (W.D.N.Y. May 23, 1974)* citing Greene County, Conservation Society, and I-219 [sic] Why? the court issued a preliminary injunction on a highway project, the contract for which had been awarded 6 months before plaintiffs brought suit. The court said "[t]hat no EIS as defined by NEPA has been prepared by any federal agency is admitted. In this court's opinion, this admission is critical." ____ F. Supp. at _____, 6 ERC at 1939.

Five circuits have upheld District Court opinions finding FHWA review of a state-prepared EIS in compliance with NEPA. In Movement Against Destruction v. Volpe, ____ F. 2d _____ (4th Cir. March 19, 1974), aff'g. 361 F. Supp. 1360 (D.C. Md. 1973), Citizens Environmental Council v. Volpe, 484 F. 2d 870 (10th Cir. 1973), and Life Of The Land v. Brinegar, 485 F. 2d 460 (9th Cir. 1973) (actually involving analogous FHA regulations and review), the courts found that a federal agency's good faith review of an EIS prepared by state "partner" agency pursuant to the federal agency's own procedural guidelines satisfied NEPA.**

In Finish Altoona's Interstate Right, Inc. v. Volpe, 484 F. 2d 638 (5th Cir. 1973), and Iowa Citizens For Environmental

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* Unreported at the time of Judge Coffrin's opinion.

** Using this rationale, if PASNY's EIS in Greene County had considered all of the 5 criteria required by NEPA, it would have been declared adequate by the Second Circuit.

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Quality, Inc. v. Volpe, 487 F. 2d 849 (8th Cir. 1973), the federal agency was found not to have "abdicated a significant part of its authority" where PPM 90-1 had been followed and the agency had added supplemental information or detailed reports to the states' final EIS.*

In sum, it appears that five circuits disagree that NEPA mandates a strict standard of compliance and are content to abide by the regulations issued by FHWA, or to find that FHWA has complied by the addition of piecemeal FHWA-prepared information to an applicant's EIS. NEPA and Greene County require more.

A. AN EIS PREPARED PURSUANT TO FHWA PPM 90-1 BY AN APPLICANT FOR FEDERAL-AID HIGHWAY FUNDS IS NOT A STATEMENT PREPARED BY "THE RESPONSIBLE OFFICIAL" UNDER SECTION 102(2)(C) OF NEPA, 42 U.S.C. 4332(2)(C).

In the instant case the District Court found that the VHD prepared the EIS pursuant to PPM 90-1 (Op. pp. 7 and 11). Frequent consultation between the FHWA Division office and VHD (Op. p. 7), and extensive review and comment on the draft EIS by the division and regional offices of FHWA (Op. pp. 8, 9) constituted significant FHWA participation in preparing the EIS, the District Court concluded. The District Court found, however, that FHWA "did not conduct any independent analysis of the project" nor did it write "any part of the EIS." (Op. p. 8).

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*Contra: Greene County, wherein the court held that an independent analysis of a part of PASNY's EIS "...cannot replace a single coherent and comprehensive environmental analysis..." 455 F. 2d at _____.

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Plaintiffs fail to understand how the District Court's findings and its disagreement with the rationale of Conservation Society II, supra, serve to distinguish the instant case from this Court's holding in Greene County.* A "primary and non-delegable responsibility" of FHWA has been assigned to VHD and that delegation has been blessed only by the regulations of the assigning agency (PPM 90-1). These regulations do not bear the imprimatur of the Council on Environmental Quality**. Nor have they been adopted by Congress.***

In distinguishing the instant case from Greene County (which together with Conservation Society II founded its conclusions in large part upon fears of applicant bias and self-serving assumptions) the District Court failed to make any

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*Alluded to, if not reiterated, in Hanly v. Mitchell, 460 F. 2d 640, 4 ERC 1152, 1157 (2d Cir. 1972), cert. denied, ___ U.S. ___ No. 72-242 (1972) and Harlem Valley v. Stafford, ____ F. 2d ____, 6 ERC 1855, 1859, 1860 (2d Cir. June 18, 1974)

**The CEQ guidelines permit the federal agency to receive initial information from an applicant. However, "[in] all cases the agency should make its own evaluation of the environmental issues and take responsibility for the scope and content of the draft and final environmental statements." 40 CFR §1500.7(c)(1973).

***After the Hearings on Red Tape before the sub-committee on Investigations and Oversight of the House Committee on Public Works, 92d Cong., 1st Sess. at 63 (1971) enacted Section 108 and 116 of the 1973 Highway Act (23 U.S.C. §§108 and 116). These sections greatly increased the Secretary of Transportation's authority to delegate his responsibilities. But in Section 116(c) the Congress expressly declared: Nothing in this act shall affect or discharge any responsibility or obligation of the Secretary under any federal law, including the National Environmental Policy Act of 1969 U.S.C. Section 4331, ...Pub. L. No. 93-87 Section 116(e).

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finding relative to the bias (or lack thereof) of VHD. In fact, the record is uncontroverted that the Vermont legislature, through its approval of a seven-year construction program, directs construction of its highways and that U.S. 2 and the U.S. 2-I-91 interchange are included in the most recent program. It is therefore impossible for VHD to opt for the "no-build" alternative in the EIS or to seriously weigh the possibility of an interchange designed to accomodate a 2-lane U.S. 2 reconstructed on location.*

Unless the FHWA independently studies and analyzes the project in light of NEPA's requirements, the cumulative effects of bias (be it inherent or not) in an applicant's evaluation may pass unchecked through any subsequent agency review process. The danger of self-serving assumptions is that they are unreviewable, by either the responsible official or by the courts, let alone intervening parties. Even assuming that the effects of bias could be uncovered by the reviewing agency, the thoughts of Judge Blumenfeld seem apposite:

> I am not persuaded that FHWA supervision and control of state EIS writers is sufficiently amenable to judicial review to make case by case evaluation of the FHWA's influence on an EIS preferable to Greene County's per se rule of invalidation of a state-authored EIS. The per se rule, if applied by all circuits, would lead to appropriate regulations on EIS authorship and would shift the burden of monitoring compliance with this aspect of NEPA to the agencies themselves.
>
> I-291 Why?, supra, at 246 n. 72.

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*Thus the EIS is "...inherently biased in favor of the proposed highway construction and in derogation of environmental considerations." Conservation Society II, supra., at 633.

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The District Court also found that VHD was the initial decision maker and concluded that the initial decision maker is in the best position to evaluate the environmental effects of and alternatives to the proposed action. (Op. p. 11., citing City of New York v. U.S. (II), 344 F. Supp. 929, 938 (E.D.N.Y. 1972) (Friendly, C.J.) (three judge panel). Following this logic, if PASNY was the initial decision maker in Greene County, it should have been the proper party to prepare the EIS. Such a course was specifically rejected in Greene County. Moreover, City of New York (II) does not appear to express the view that the initial decision maker under NEPA is anyone other than the federal agency involved in the matter. In fact, Chief Judge Friendly focused specific attention on Greene County's holding that "[t]he FPC violated 'NEPA by conducting hearings prior to preparation by its staff of its own impact statement'." City of New York (II), supra, at ____, 4 ERC 1646, 1653, citing Greene County, supra, at 422. Even if City of New York (II) may be read for the proposition that the initial decision maker under NEPA may be someone other than the federal agency, the major federal action significantly affecting the human environment is the commitment of Federal-aid funds to highway construction activities undertaken by the State of Vermont. Greene County addresses itself to the "responsible official" under NEPA, and the official responsible for the commitment of federal monies

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is assuredly not VHD.*

The federal agency itself need not be entirely disinterested (the Corps of Engineers builds dams, FPC insures power production, AEC promotes atomic energy, and DOT provides national transportation systems). But only the federal agencies are required by NEPA to take full account of a proposed project's environmental effects and alternatives.

B. THE FHWA HAS NOT COMPLIED "TO THE FULLEST EXTENT POSSIBLE" WITH SECTION 102(2)(C) of NEPA, 42 U.S.C. 4332(2)(C).

The §102 requirements of NEPA are "not highly flexible. Indeed, they establish a standard of strict compliance." I-291 Why?, supra, at _____, 6 ERC at 1287, citing Calvert Cliffs', supra, 449 F. 2d at 1112. Only if there is a clear conflict of express statutory authority is the agency relieved from compliance with that standard. Monroe County Conservation Council v. Volpe, 472 F. 2d 693, ____ (2d Cir. 1972).

No existing law applicable to FHWA precludes its compliance with NEPA. VHD may plan, design and construct roads, and has a sovereign right to select the routes for which it seeks federal funding, 23 U.S.C. §§103, 123. Nevertheless, the Secretary of Transportation, through FHWA, decides whether to

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NEPA's mandate applies exclusively to federal agencies, Miltenberger v. Chesapeake & O. Ry. Co., 450 F. 2d 971, 974 (4th Cir. 1971). See also the numerous cases holding that a highway project is distinctly a state undertaking, the state need not comply with NEPA by filing an EIS: Citizens For Balanced Environment and Transportation, ____ F. Supp. ____, 6 ERC 1289 (D. Conn. 1974) appeal filed, No. 74-1730 (2d Cir. 1974).

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accept that selection:

> The Secretary shall have authority to approve, in whole or in part, the Federal-Aid Primary systems... or to require modifications or revisions thereof. No Federal-aid system or portion thereof shall be eligible for projects in which federal funds participate until approved by the Secretary.
> 23 U.S.C. §103.

Rather than creating an impossible restriction on FHWA's previous relationship with the state, NEPA merely adds a new set of criteria which the federal agency must consider in approving the state's selection.*

In the absence of a statutory conflict, FHWA's delegation of EIS responsibilities pursuant to Policy and Procedure Memorandum (PPM) 90-1** falls short of NEPA's mandate to implement its policies "to the fullest extent possible." The procedures evolved by FHWA (through PPM 90-1) have not arisen in response to NEPA. They reflect a compromise between NEPA's requirements and the administrative constraints*** of the pre-NEPA status quo.

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*The "Secretary's" decision is actually made in a number of stages, including program approval, systems relocation approval, location approval, design approval and "PS&E" approval. cf. Arlington Coalition v. Volpe, 458 F. 2d 1323 (4th Cir. 1972. The Second Circuit has concluded that when FHWA grants "PS&E" approval, the federal government has become committeed to a [major] federal action. Monroe County, supra.

**2 ELR 46106 (Aug. 24, 1971). PPM 90-1, provides that the state highway department shall prepare both draft and final environmental statements for review, acceptance, and adoption by FHWA.

***Advance Planner Arthur Goss testified that FHWA provided 90% of the funds required for the state's preparation of the draft and final EIS. Thus, it appears well within FHWA's capacity to develop a staff with the expertise and resources necessary to prepare a "detailed statement by the responsible official."

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This is not enough. Considerations of administrative difficulty or delay will not suffice to strip the act of its fundamental importance. Calvert Cliffs Coordinating Committee v. AEC, 449 F. 2d 1109, 1115 (D.C. Cir. 1972), cert. denied, 404 U.S. 942 (1972).

PPM 90-1 does not comply with NEPA, Greene County or the CEQ guidelines, supra. Failure of the responsible federal official to make his own evaluation of the environmental issues must render the EIS prepared pursuant to PPM 90-1 not merely deficient, but void ab initio. The defendants' compliance with FHWA's own self-serving procedures cannot provide them with talismanic immunity from the requirements of NEPA:

> [T]he ultimate question as to whether an agency procedure violates NEPA is one of law and must be resolved by this Court The agency cannot be its own self-arbiter of whether it exceeds its delegated power. Iowa Citizens v. Volpe, 487 F. 2d 849, 6 ERC 1088, (8th Cir. 1973) (Lay, J. dissenting.)

POINT II

DEFENDANT'S ACTIVITIES ON THE SLEEPERS RIVER ARE IN VIOLATION OF THE FEDERAL WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972, 33 U.S.C. Sections 1301, 1444

A. THE FACTS DO NOT CONSTITUTE A BAR TO THE DISTRICT COURT'S CONSIDERATION OF PLAINTIFFS' CLAIMS UNDER THE FEDERAL WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972, 33 U.S.C. §§1251, ET SEQ.

In its consideration of plaintiffs' assertion that the defendants have been acting in violation of the requirements of the Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. §1251 et seq., the District Court concluded that

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plaintiffs' failure to comply with the notice requirements of §505 of the Act, 33 U.S.C. §1365, acted as a jurisdictional bar to its consideration of the claim.*

33 U.S.C. §1365 provides, in part:

> (a) Except as provided in subsection B of this section, any citizen may commence a civil action on his own behalf (1) against any person...who is alleged to be in violation of (a) an effluent standard limitation under this Act...The District Court shall have jurisdiction...to enforce such an effluent standard or limitation...
>
> (b) "no action may be commenced (1) under section (a)(1) of this section (A) prior to 60 days after the plaintiff has given notice of the alleged violation to the [Environmental Protection Agency], to the state in which the alleged violation occurs, and to any alleged violator of the standard, limitation, or order...
>
> (c) nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any effluent standard or limitation or to seek any other relief (including relief against the administrator or a state agency).

The District Court concluded that where a statute makes explicit provision for citizens suits, that provision is the exclusive manner by which the court may entertain issues arising under the statute.

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*But in Montgomery Environmental Coalition v. Fri, 366 F. Supp. 261 (D.D.C. 1973) on which Judge Coffrin relied, the court sustained jurisdiction under §1365 notwithstanding that plaintiff filed suit less than 60 days after serving notice. It never had to reach the issue of other bases of jurisdiction, infra.

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When the remedy provided by a statute is adequate, and where, by its terms, that remedy is the exclusive one, then the District Court's conclusion may be correct. However, the FWPCA explicitly provides that it does not prohibit a citizen from seeking alternative methods of enforcing effluent limitations. 33 U.S.C. §1365(3), supra. Moreover, in the instant case, the citizen suit provision within FWPCA is not adequate to ensure compliance with the Act.

Recent cases dealing with a citizen's capacity to ensure compliance with environmental statutes have considered the question from a number of viewpoints, including standing and jurisdiction over the subject matter. In Alameda Conservation Association v. California, 437 F. 2d. 1087 (9th Cir. 1971), cert. denied 402 U.S. 908, (1971), the Ninth Circuit found little merit in defendants' assertion that plaintiffs were not proper parties to enforce the Rivers and Harbors Act of 1899. The court granted standing to individual plaintiffs who showed that they enjoyed the natural resource that was about to be destroyed. The court stated:

> Standing focuses on the party seeking to place his complaint before the court, rather than on the issue to be decided and the question is whether or not that party has a sufficiently personal stake in the outcome as to justify the court in entertaining his position.
>
> 437 F. 2d at 1091, 2 ERC at 1178, citing Flast v. Cohen 392 U.S. 83 (1968), Association of Data Processing Organization, Inc. v. Camp, 397 U.S. 150 (1970)

In the instant case, the District Court has already deter-

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minted that plaintiffs will be irreparably harmed should construction on Sleepers River go forward. Thus, interests vested by statute in the plaintiffs will be adversely affected by defendants' activities. Plaintiffs have therefore met the test of standing, and in fact defendants agreed during the hearing on the merits that standing requirements under SCRAP v. U.S., 409 U.S. 1207, 4 ERC 1449 (1973) were satisifed.

In Sierra Club v. Leslie Salt, 354 F. Supp. 1099, 4 ERC 1663 (N.D. Cal. 1972), the court considered the plaintiffs "right of action" under the Rivers and Harbors Act as a question of subject matter jurisdiction. That act provided that "proper proceedings...may be instituted under the direction of the Attorney General of the United States". 33 U.S.C. §406. Citing Alameda, supra, the court held:

> ...it is the law in the Ninth Circuit that a claim for injunctive relief for violation of 33 U.S.C. §403, otherwise sufficient, should not be dismissed merely because the action has been brought by "private" individuals instead of by the Attorney General. 354 F. Supp. at 1104, 4 ERC at 1666.

The court distinguished Connecticut Action Now v. Roberts Plating, 457 F. 2d 81, 3 ERC 1934 (2nd Cir. 1972) as dealing only with a private citizen's ability to bring suit under the criminal penalty provisions of the Rivers and Harbors Act, and under a section which made no provision for injunctive relief. Sierra Club v. Leslie Salt, 354, F. Supp. at 1104, 4 ERC at 1666.

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Moreover, Connecticut Action Now, supra, dealt with an effort to enjoin a private defendant from polluting activities in circumstances in which the administrator of the act was empowered to bring the action but may have chosen, for policy reasons, not to do so. In the instant case the defendants are public agencies:

> Here the United States Attorney is counsel for the defendants and is in no position to enforce the Refuse Act...In the ordinary case, where a private plaintiff seeks to enforce the Refuse Act against another private party, it is sound judicial administration to deny standing to the private plaintiff...However, this case is an extraordinary one...this is not merely a suit between parties, but a violation to enjoin a federal agency from disbursing funds in violation of federal law.
> Natural Resources Defense Council v. Grant, ____ F. Supp. _____, 4 ERC 1001, 1007 (E.D.N.C. 1973)

Under these circumstances an action is both available and appropriate to ensure compliance with FWPCA. In addition, the court may find subject matter jurisdiction under the Administrative Procedures Act, 5 U.S.C. §§701-706, the general federal question jurisdictional statute, 28 U.S.C. §1331,* and NEPA, 42 U.S.C. §4321 et seq.

5 U.S.C. provides, in part:

> [a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action...is entitled to judicial review thereof.

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*In Highland Park v. Train, ___ F. Supp. ___, 6 ERC 1464 (N.D. Ill. 1974) holding jurisdiction under 28 U.S.C. §1331 despite plaintiffs failure to comply with the analogous notice provisions of the Air Quality Act, 42 U.S.C. §1857h-2, but dismissed the case for failure to state a claim upon which relief could be granted, in view of the defendants' [EPA's] compliance with a previously court-ordered schedule of actions.

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5 U.S.C. §704 adds:

> [a]gency actions made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review.

The APA only authorizes the court to review the agency action when there is an "absence or inadequacy" in the "special statutory review proceeding relevant to the subject matter specified" by the particular statute. 5 U.S.C. §703. The courts have more generally established a rule that "where Congress has provided adequate procedures for judicial review of administrative action, the procedure must be followed." Highland Park v. Train, _____ F. Supp. _____, 6 ERC 1467, 1469 (N.D. Ill. 1974), citing United States v. Southern Ry. Co., 364 F. 2d 86 (5th Cir. 1966), cert. denied, 386 U.S. 1031 (1967).

But the review proceedings under FWPCA are not entirely adequate to prevent §301(a) violations through failure to obtain §404 permits. The proceeding established under §1365 primarily contemplates on-going point-source discharges in excess of effluent limitations, or without dicharge permits: both are remediable situations. §1365 does not specify the manner by which a citizen may act to halt the irretrivable ecological disruption resulting from a "one-shot" discharge such as a filling operation (which requires a §404 permit).

If a citizen must wait 60 days after notification to provide the Corps of Engineers time to enforce §404, the action of the violators may already have taken place. Had plaintiffs given §1365 notice at the time this suit was commenced under NEPA,

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the resource which they seek to protect would have been eliminated on August 16 (the date of the District Court's final order). §1365 does not even provide for notice to the Corps of Engineers, which must issue §404 permits. The Corps could not have taken action against the defendants, who are represented by the U.S. Attorney. §1365 provides no mechanism for the review of the administrative actions of FHWA or VHD.

The review procedures established in §1365 are inadequate to deal with the problem of §404 violations, inappropriate for the review of actions other than those of the Corps or EPA, and insufficient to preserve the resources which plaintiffs seek to protect. Jurisdiction over the subject matter therefore exists under the APA.*

Moreover, the District Court jurisdiction of this case would have existed under the above-cited statute even if the citizen suit provision had not been included in FWPCA. §1365(3) of that Act expressly preserves such jurisdiction by specifically providing that it is not the exclusive method for judicial review of violations.**

In Highland Park, supra, the court found policy considera-

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*See Scenic Hudson Preservation Conference v. Callaway (III), ___ F. Supp. ___, 6 ERC 1241 (S.D.N.Y. 1973), in which a FWPCA citizen suit against the Corps was founded upon the APA.

** Cases upholding jurisdiction despite failure to comply with notice provisions include: Scenic Hudson III, supra; N.R.D.C. v. Quarles, ___ F. Supp. __, (Civil No. 1629-73, D. D.C. February 19, 1974).

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tions decidedly against permitting a suit by private citizens absent compliance with the Air Quality notice provisions. The court there was dealing with a suit attempting to challenge a complex regulatory scheme administered by the defendant (Secretary of EPA). The instant case presents no such spectre of disruption of the FWPCA administrator's functions. Plaintiffs simply seek to insure that FHWA and VHD comply with a non-discretionary requirement of FWPCA, in hope of preserving a valuable natural resource.

B. THE DEFENDANTS' ACTIVITIES IN THE SLEEPERS RIVER ARE OF A KIND AND IN A LOCATION WHICH CONGRESS INTENDED TO REGULATE THROUGH THE FEDERAL WATER POLLUTION CONTROL AMENDMENTS OF 1972, 33 U.S.C. 1251 et seq.

Section 301(a) of FWPCA, 33 U.S.C. prohibits the discharge of any pollutant by any person without a permit. Section 502(12) (33 U.S.C. 1362), defines "discharge of a pollutant" as

> (A) any addition of any pollutant to navigable waters from any point source, (B) any addition of any pollutant to the waters of the contiguous zone or the areas from any point source other than a vessel or other floating craft. (Emphasis supplied).

Section 502(6) of the act defines "pollutant" as any "dredged spoiled, solid waste...rock, [and] sand..."

The term "point source", defined in 502(14), 33 U.S.C. §1362(14), broadly includes:

> "any discernable, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, controlling stock, concentrated animal feeding operation,

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or vessel, or other floating craft from which pollutants are or may be discharged.

The conference committee report on 404 of the act, 33 U.S.C. §1344, clearly states that "failure to obtain a permit under this section, or failure to comply with the requirements of such a permit, would be a violation of section 301(a)...". Conference Committee Report, Legislative History of the Water Pollution Control Act Amendments of 1972, Vol. I, p. 325.

The Corps of Engineers regulations implementing the permit program under §404 defines "dredged material" as "any material excavated or dredged from navigable waters of the United States including any runoff or overflow which occurs during a dredging operation or from a contained land and water dispoal area." 39 FR 12115, 12119 (9174). The regulations define "fill material" as "any material deposited or discharged into navigable waters which may result in creating fastlands or other planned elevations." Id.

Defendants have violated §301(a) directly by discharging sand and silt, through a drainage ditch, into the Sleepers River. They have violated §301(a) via §404 by rechanneling a section of Sleepers River, which required excavation of the bed and banks of the river at either end of the new channel. Further excavation in Sleepers River will be required to complete the planned rechannelization. The old river bed will ultimately be occupied by structures or elevated portions of U.S. Route 2 and Interstate 91.

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Plaintiffs have demonstrated that these activities will have a serious effect upon the ecological integrity of the river, at and below the area of rechannelization. The objective of FWPCA is not to insure the navigability of the rivers of the United States. Its purpose is "to restore and maintain the chemical, physical and biological integrity of the Nation's waters", FWPCA §101(a), 33 U.S.C. §1251, and to attain "...water quality which provides for protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water..." FWPCA §101(a)(2).

Section 404, 33 U.S.C. §1344, provides that in issuing §404 permits, the Secretary of the Army shall consider whether the proposed activities will "have an unacceptable adverse effect on municipal water supplies, shellfish beds, and fishery areas (including spawning and breeding areas, wildlife or recreational areas)." Before the issuance of such permits, there must be an opportunity for public hearings on the proposed action.

The activities which defendants seek to continue are thus precisely the kind, and have precisely the effects, which the legislature sought to control. They will also be taking place in areas into which the legislature sought to extend its regulatory authority.

The FWPCA defines "navigable waters" as "waters of the United States, including the territorial seas". 33 U.S.C. 1362 (7). On its face, the statute applies to all the waters within the United States, plus its territorial seas.

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Clarification of the legislation may be found in the legislative history of the act. The House of Representatives bill, H.R. 11896, contained the traditional "navigability" restriction, redundantly defining navigable waters as "The Navigable waters of the Untied States, including territorial seas;" Legislative History, Vol. 1. p. 1069.

The Senate Bill, S. 2770, defined navigable waters as "navigable waters of the United States, portions thereof, and the tributaries thereof, including the territorial seas and the Great Lakes". Legislative History, Vol. 2, p. 1698. The accompanying Senate Report made it clear that:

> Water moves in hydrologic cycles and it is essential that discharge of pollutants be controlled at the source. Therefore, reference to the control requirements must be made to the navigable waters, portions thereof, and their tributaries. Legislative History, Vol. 2. p. 1495.

The Conference Committee went even further, producing the definition now contained in the act, and explaining:

> The conferees fully intend that the term "navigable waters" be given the broadest possible constitutional interpretation unencumbered by agency determinations which have been made or may be made for administrative purposes. Legislative History Vol. 1. p. 250.

Conference Committee member Rep. Dingill, presenting the Conference Committee version to the House, explained that the Act's definition includes: "All the waters of the United States" in a geographical sense. It does not mean "navigable waters of the United States in a technical sense as we sometimes see in law."

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Legislative History, id.

The conference report, and the case law cited therein, id., illustrate not merely acceptance of the broadened judicial interpretation of the meaning of "navigability" but recognition that the judicial construction of Congress' authority to regulate under the Commerce Clause of the Constitution, Article I §8 A. 3 has been constantly broadening. By defining "navigable waters" as "waters of the United States...", Congress made a distinct effort not to hamper that expansion. The "former test of navigability was...defined away in the FWPCA."* U.S. v. Holland,** ____ F. Supp. _____, 6 ERC 1388, 1392 (M.D. Fla. 1974), cf. U.S. v. Ashland Oil and Transportation Co., 364 F. Supp. 349 (W.D. Ky. 1973).

Sections 102(2)(C)(iii) and 102(2)(D)(iii) of NEPA, 42 U.S.C. §4332(2)(C) and (D), require that every report (EIS) on major federal actions include "alternatives to the proposed action," and call upon all agencies of the federal government to "study, develop and describe appropriate alternatives to recommended

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*In Holland, the Act and its accompanying history led the District Court to find that the filing of a physically non-navigable man-made mosquito canal was subject to the provisions of FWPCA.

**Corps §404 permits cannot be issued with EPA concurrence. EPA has stated that the new definition of "navigable waters" "...eliminated the requirement of navigability. The only remaining requirement, thus, is that pollution of waters covered by the bill must be capable of affecting interstate commerce." Environmental Protection Agency Memorandum to Regional Offices On the Meaning of the Term "Navigable Waters", 4 ELR 46318. (1974).

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courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources.*

In Monroe County Conservation Council v. Volpe, 472 F. 2d 695 (2nd Cir. 1973) this court declared that:

> The requirement for a thorough study and a detailed description of alternatives...is the lynchpin of the entire impact statement...** Consideration, of course, must be given to the feasibility and impact of the abandonment of the project. 472 F. 2d at 697, 698.

Natural Resources Defense Council, Inc. v. Morton, 458 F. 2d 827 (D.C. Cir. 1972) (upon which this court in Monroe County relied, in part) made it clear that:

> The discussion of alternatives need not be exhaustive. What is required is information sufficient to permit a reasoned choice of alternatives so far as environmental aspects are concerned. 458 F. 2d at 836 (emphasis supplied).

In reviewing the adequacy of the EIS at issue, the District Court adopted the "substantive test", as applied in Conservation Society (II), supra, at 632, 633. "The test does not require subjective impartiality by the involved agency, but rather a good faith consideration of the impact of the project on the human

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*The Senate Report on NEPA elaborated on §102(C): ...the agency shall develop information and provide descriptions of alternatives in adequate detail for subsequent reviewers and decisonmakers, both within the executive branch and the Congress to consider the alternatives along with the principal recommendation. S. Rep. No. 91-296, 91st Cong. Sess. p. 21.

**Citing the CEQ guidelines 6(IV), 36 Fed. Reg. 7724, 7725 (1971) "a rigorous and objective evaluation of alternative actions that might avoid some or all of the adverse environmental effects is essential."

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environment."* (Opinion at p. 16) "We are not at liberty to substitute our judgment...for that of the agency charged with the responsibility of preparing the EIS...even if it is obvious that the same evidence which we have considered would be available to the agency and almost of necessity would result in the same conclusion."** (Opinion at p. 33)

The District Court found that neither of the plaintiffs' suggested alternatives to the "Sleepers River" interchange were viable. But it went on to note that:

> neither these or other alternatives, if any, are set forth in the EIS as required by NEPA... (Op. p. 19).
>
> ...we feel that alternatives to the location of the Sleepers River interchange would not be required in this instance were it not for the obvious ecological impact which its construction will have upon the River itself and its vicinity (Op. pp. 20, 21).
>
> ...The fact remains, however, that the EIS fails to consider the elimination of the interchange as an alternative to eliminating or severely reducing the ecological impact upon the Sleepers River and the EIS is deficient in this regard. (Op. p. 21)
>
> ...in its present form...the EIS is flawed by its failure to consider this obvious alternative. (Op. p. 33).

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*cf. Environmental Defense Fund v. Froehlke, 473 F. 2d 346, 353 (8th Cir.): "The review is a limited one for the purposes of determining whether the agency reached its decision after a full, good faith consideration of environmental factors made under the standards set forth in §§101 and 102 of NEPA; and whether the balance of costs and benefits struck...was arbitrary or clearly gave insufficient weight to environmental factors."

**Citing: Overton Park, supra. Iowa Citizens, supra, 487 F. 2d 849.

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Under either the "substantive" or "procedural" test the EIS is deficient. The agency did not make its decision after a "full...consideration...under the standards set forth in §§1101 and 102"; there is not substantial evidence that all of the criteria required under the law were even catalogued and set forth, much less considered. That there was a "good faith consideration of the relevant environmental factors" (Op. p. 16) is largely irrelevant when that consideration failed (for whatever reason) to include the factors required by law. The court's inquiry need not go to the merits of a discretionary agency review; it is considering whether an agency decision took place after certain ministerial duties mandated by NEPA had been carried out. The Administrative Procedures Act, upon which the District Court founded jurisdiction to entertain plaintiffs' claims states:

> The reviewing court shall...(2) hold unlawful and set aside agency action, findings, and conclusions found to be
> (a) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.
> 5 U.S.C. §706(2)(A)(Emphasis supplied)

The defendants actions were plainly not in accordance with NEPA.

Moreover, plaintiffs must respectfully submit that in its analysis of the degree of agency compliance with NEPA, the District Court did, in fact, "substitute [its] judgment for that of the agency charged with the responsibility of preparing the EIS," by concluding that:

> The Sleepers River Interchange needs to be built for the benefit of the travelling public and the effective utilization of I-91 regardless of whether

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the 4.3 mile relocation of existing U.S. Route 2... is accomplished (Op. p. 23).

This conclusion not only affected the Court's consideration of plaintiffs' suggested alternatives, but also its balancing of the equities in deciding no injunction should issue despite a substantive NEPA violation. That I-91 will ultimately be completed plaintiffs accept as a foregone conclusion. That there must be some connection between I-91, North Danville, and Route 2 is a valid presumption. But that construction of this interchange is "necessary to link I-91 with existing U.S. 2, the vicinity of North Danville, and St. Johnsbury Village." *is a finding which goes beyond the expertise of the Court. It is the kind of conclusion which could only be reached after a "full and good faith consideration" of alternatives to the proposed design and location of the Sleepers River interchange, in light of the "obvious ecological impact which its construction will have upon the river itself and its vicinity." (Op. p. 21).

A. THE SCOPE OF APPELLATE REVIEW OF AN ORDER GRANTING OR DENYING AN INJUNCTION IS BROAD WHEN IT APPEARS THAT THE DISTRICT COURT'S CONSIDERATION OF THE MERITS OF PLAINTIFFS' CLAIM, ITS BALANCING OF THE EQUITIES, AND ITS CONSIDERATION OF THE PUBLIC INTEREST, WAS BASED ON A MISCONCEPTION OF THE APPLICABLE LAW.

In NRDC v. Morton, supra, when appellees asserted that the trial court's decision whether or not to enjoin a federal action was wholly discretionary, the court of appeals made it clear that there are circumstances in which the appellate court

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*It should be noted that if the interchange is built, there will be no way to utilize the interchange from Route 2 east of I-91.

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may appropriately reverse an order granting or denying an injunction:

> ...a greater amplitude of judicial review is called for when the appeal presents a substantial issue that the action of the trial judge was based on a premise as to the pertinent rule of law that was erroneous. The analysis of injury to both parties [and] the public interest may well come to depend on an assumption of underlying legal premises...a reversal based on a disagreement with the underlying legal premise of the trial court is not based on, or to be construed as, a determination of arbitrary abuse of judicial discretion.
> 458 F. 2d at 832.

There may be a discretionary oversight in agency action which results in but de minimis derogation of NEPA. But "the Section 102 duties of NPEA are not inherently flexible." Calvert Cliffs Coordinating Committee v. AEC, 449 F. 2d 1109, 1115 (D.C. Cir. 1972). They establish a mandatory (not discretionary) standard of strict compliance "unless some existing law applicable to the agency made compliance impossible". Monroe County, supra at 4 ERC 1886, 1889, citing Calvert Cliffs', supra.

Given the District Court's finding that the EIS failed to describe any alternatives to the proposed interchange in view of its impact on Sleepers River, FHWA's agency action, (its commitment of federal funds to these projects) should have been "set aside...[as] ...not in accorance with the law." 5 U.S.C. 706 (2)(A). Characterizing the agency's failure to consider any alternatives to the interchange as a mere "good faith" oversight (Op. p. 23) should not to serve to exempt it from considering and including in its EIS factors specifically required by NEPA.

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Moreover, the District Court appears to have given very little, if any, weight to the possibility that the Greene County per se rule controls in the instant case. If the District Court has in fact misconceived the applicable law and the EIS is void ob inititio, as plaintiffs maintain, then the scope of appellate review before the Court ought to include an analysis of the relationship between the District Court's misapprehended underlying legal premise and its failure to fashion relief adequate to protect the plaintiffs' interests.

B. WHETHER INJUNCTIVE RELIEF IS THE APPROPRIATE RESULT WHEN LACHES IS NOT AN ISSUE, PLAINTIFFS HAVE SHOWN IMMINENT IRREPARABLE HARM AND THE DISTRICT COURT HAS FOUND A SUBSTANTIVE VIOLATION OF THE NATIONAL ENVIRONMENTAL POLICY ACT OF 1969.

A number of cases cited by the District Court have suggested that not every NEPA violation mandates an injunction. In Environmental Defense Fund v. Froehlke, 348 F. Supp. 338, 356 (W. D. Ariz. 1972), aff'd 477 F. 2d 1033 (8th Cir. 1973) the Circuit Court refused to grant an injunction pending NEPA compliance due to the demonstrated good faith of the defendants, their showing that no significant environmental harm would occur pending compliance and the trial court's finding of insignificant environmental impacts in ongoing construction. The

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Eighth Circuit stated:

> In short, we are persuaded that this is not a case where, unless the plaintiffs receive now whatever relief they are entitled to, "there is a danger that it will be of little or no value to them or anyone else, when finally obtained." 477 F. 2d 1033, ____ 5 ERC 1313, 1315-1316. Citing Latham v. Volpe, 455 F. 2d 1111, 1117 (9th Cir.) 1971)

In Minnesota PIRG v. Butz, 358 F. Supp. 584 (D. Minn. 1973) Judge Lord did indeed find that injunctions for NEPA violations are not automatic, and would not issue, for instance, when "a substantial amount of construction had already taken place by the time of the lawsuit...[and]...an injunction pending the filing of the impact statement was not necessary to preserve the rights of the plaintiffs and to ensure a meaningful review by the agency." 358 F. Supp. at _____, 5 ERC 1251 at 1281, cf. MECCA v. AEC, No. 4-72 Civ. 109, 4 ERC 1876 (D. Minn. 1972). The court went on to enjoin the projects at issue.

In EDF v. Armstrong, 352 F. Supp. 50, 60, (D. Cal. 1972), aff'd. 487 F. 2d 814 (9th Cir. 1973), both the district and circuit courts found no absolute right to a mandatory injuncton, and refused to issue one, where plaintiffs had made no showing of immediate irreparable harm in the absence of an injunction.

In Hecht v. Bowles, 321 U.S. 321 (1944), the district court had concluded that the Emergency Price Control Act of 1942 did not provide for an automatic injunction against all proven violators. The court refused an injunction where defendant showed that when violations had been drawn to their attention, they had taken immediate steps to correct those mistakes

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and to prevent the occurence of future violations. The Supreme Court affirmed, but indicated that the district court, rather than dismissing the action, should have retained jurisdiction to ensure future compliance and enforcement against subsequent violations.

The above-cited cases appear to stand firmly for the proposition that a mere showing that there has been a violation of a federal statute will not entitle the private plaintiff to injunctive relief; such extraordinary relief will only issue, when, in addition, plaintiff will otherwise suffer irreparable harm or compliance is not otherwise assured. In fact, upon a review of the reported opinions on Federal-aid highway project/ NEPA cases, the overwhelming conclusion is that, in the absence of laches* when plaintiffs have demonstrated substantive violations of the Act** and impending irreparable harm*** an injunction has issued****.

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*Injunctive relief denied because of laches: Clark v. Volpe, 342 F. Supp. 1324, (E.D. La. 1972); Centerview v. Brinegar, 367 F. Supp. 633, (D.C. Cal. 1973).

**Injunctive relief denied where no violation of the Act: Citizens v. Volpe, ___ F. Supp. ___, 3 ERC 1031 (ND. Ind. 1971) no likelihood of success on the merits), aff'd 466 F. 2d 991, (7th Cir. 1972); Ragland v. Mueller, 460 F. 2d 1196, (5th Cir. 1972) (no claim for relief: NEPA not retroactive); Daley v. Volpe, 326 F. Supp. 868, (W.D. Wash. 1971) (no likelihood of success on the merits because plaintiffs' objections related to timing of statement, not content); Pizitz v. Volpe, __ F. Supp. ___, 4 ERC 1196 (D. Ala. 1972), (5th Cir. 1972) (full procedural NEPA compliance consideration of all points required by NEPA); CBET v. Volpe, ____ F. Supp. ___, 6 ERC 1595 (D. Conn. 1974) (NEPA does not apply to state highway projects); Daley v. Volpe, ____ F. Supp. ___ 6 ERC 1826 (D. W. Wash. 1974) (NEPA satisfied by

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EIS consideration of specific alternatives): Fayettteville v. Volpe, ___ F. Supp. ____, 6 ERC 1891 (D.E.N.C. 1974) (where EIS contains consideration of alternatives, it need not contain consideration of all alternatives).

***Injunctive relief denied where no irreparable harm was impending: Brooks v. Volpe, 250 F. Supp. 269, 287, 4 ERC 1532 (D. W. Wash. 1972) (no further defacing of environment by ongoing project); ECOS v. Volpe, ___ F. Supp. ____, 5 ERC 1019(D.N.N. C. 1973), aff'd, ___ F. 2d ____, 5 ERC 2024 (5th Cir. 1973) (no specific environmental harm shown, no showing of irreparable harm).

****Injunctions granted with above conditions met: Conservation Society v. Texas, ___ F. 2d ____, 2 ERC (5th Cir. 1971); Thompson v. Fugate, 452 F. 2d 57, (4th Cir. 1971); Arlington Coalition v. Volpe, 458 F. 2d 1323, (4th Cir. 1972), reversing 332 F. Supp. 1218 (D.E. Va. 1971); LaRaza Unida v. Volpe, 337 F. Supp. 221, (D.M. Cal. 1971); Morningside-Lenox Park Association v. Volpe, 334 F. Supp. 132, (D.N. Ga. 1971); Nolop v. Volpe, 332 F. Supp. 1364, (D.S.D. 1971); Scherr v. Volpe, 336 F. Supp. 882 (D.W. Wis. 1971), aff'd 466 F. 2d 1027, (7th Cir. 1972) (injunction without showing of irreparable harm); Stop H-3 v. Volpe, 349 F. Supp.14 353 F. Supp. 1047 (D. Hi. 1972); Indian Lookout Alliance v. Volpe, 345 F. Supp. 1167(D.S. Iowa 1972), reversed on other grounds, 484 F. 2d 11, (8th Cir. 1973); Ward v. Ackroyd, 374 F. Supp. 1202, (D. Md. 1972); Conservation Society of Southern Vermont v. Volpe, 362 F. Supp. 627(D. Vt. 1973 and note CSSV v. Volpe, 343 F. Supp. 761, (D. Vt. 1972) (projects enjoined except those in which constructon had commenced and, no significant environmental damage shown); Northside Tenants Rights Coalition v. Volpe, 346 F. Supp. 244, 4 ERC 1376 (D.E. Wisc. 1972); I-291 Why? Association v. Burns, 372 F. Supp. 223, (D. Conn. 1974); Farwell v. Brinegar ___ F. Supp. ____, 5 ERC 1939 (D. W. Wis. 1973); EDF v. Brinegar, ____ F. Supp. ____, 6 ERC 1577 (E.D. Pa. 1974). Steubing v. Brinegar, ____ F. Supp. ___, 6 ERC 1935 (W.D. N.Y. May 23, 1974); Contra: Civic Improvement Committee v. Volpe, ____ F. Supp. ____, 4 ERC 1160(D.W. N.C. 1972) aff'd 459 F. 2d 957, (4th Cir. 1972)

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C. WHETHER CONSIDERATION OF THE APPROPRIATE RELIEF FOR VIOLATION OF THE NATIONAL ENVIRONMENTAL POLICY ACT INVOLVES A TRADITIONAL BALANCING OF THE EQUITIES.

Consideration authority exists for the proposition that fashioning the relief in a NEPA case does not involve the conventional rule of balancing the equities. As Judge King points out in Stop H-3 v. Volpe I, ___ F. Supp. ___, 4 ERC 1684 (D. Hi. 1972) a NEPA action calls for a less stringent test. Id. at 1685. Under this test defendants' failure to comply with the strong Congressional policy articulated in the provisions of NEPA means that "any balancing of the equities will favor plaintiffs." Stop H-3 II, supra, 4 ERC at 1907. Plaintiffs contend that their showing that defendants' failure to comply with the rule laid down in Greene County and their failure to consider alternatives to the interchange go to the heart of NEPA's policy. It would appear that the District Court gave very little, if any, weight, to the Congressional policy of NEPA when it balanced the equities and declined to enjoin construction.

It is noteworthy that the District Court did not find that the defendants will suffer irreparable damage should the interchange projects be halted. The Court did find that certain benefits to St. Johnsbury and vicinity favored, on balancing the equities, construction of the interchange. But these benefits are sufficiently prospective in nature that delaying their realization until the defendants comply with NEPA and

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FWAA constitute substantial harm to the other parties.* Additionally, should FHWA, in its analysis under NEPA, or the Corps, under §404, decide that the project is ill-advised, then not only will irretrievable environmental damage be avoided but also considerable public monies will be saved. When the need for stringent enforcement of the strong Congressional policy is weighed against remediable economic benefits, plaintiffs respectfully submit that the equities must tip in their favor.

The District Court concluded that obvious damage to the river and its vicinity (Op. p. 21) will be occasioned by construction of the interchange. (Op. p. 21). It also found that those projects involving the Sleepers River interchange include projects I-91-3(b), F 028-4(4) and F 028-4(3).

CONCLUSION

The EIS, written entirely by VHD on projects for which it seeks 90 per cent federal funding and upon which FHWA conducted no independent studies or analysis, does not constitute a detailed statement by the responsible official as required by NEPA. Additionally, the responsible official's failure to include in the EIS consideration of any alternatives to the Sleepers River interchange is a substantive deficiency which subverts an

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*The defendants maintain that delying the interchange now will result in the loss of one year's construction time. "Delay" this court stated in Greene County, "is a concomitant of the implementation of the procedure prescribed by NEPA..." 3 ERC at 1601. And the additional costs occasioned by inflation were deemed not controlling by the District Court. (Op. p. 36).

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explicit and overriding Congressional policy and requires injunctive relief to protect plaintiffs' interests. Finally, the District Court has jurisdiction to require FHWA to seek and secure a permit under §404 of the FWPCA. Accordingly, the order of the District Court denying injunctive relief to plaintiffs should be reversed and the case remanded to it with directions to forthwith enter a permanent injunction against projects I-91-3 (b), F 028-4(4) and F 028-4(3) until and unless defendants comply with the requirements of NEPA and FWPCA.

Respectfully submitted,

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AFFIDAVIT OF SERVICE

I, Harvey D. Carter, Jnr., hereby affirm that I served copies of the foregoing Appellants Brief and Motion pusruant to Rules 28 and 30(f) by mailing copies thereof to William B. Gray, Esq., Robert C. Schwartz. Esq and Edward Zuccaro, Esq, counsel for all defendants, at their regular business mailing addresses.

Dated at Bennington, Vermont September 3, 1974.

Harvey D. Carter, Jnr.

Subscribed and sworn to
Before me, Patricia D. Warner
Notary Public

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